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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

No. 149.

CALDWELL SUGARS, INC., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

## PETITION FOR REHEARING ON DENIAL OF PETITION FOR CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

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## PETITION FOR REHEARING ON DENIAL OF PETITION FOR CERTIORARI.

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*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Caldwell Sugars, Inc., a Louisiana corporation, respectfully prays that this Court reconsider its denial of a writ of certiorari in this cause and gives as reasons therefore:

THAT, this Court granted certiorari, decided and remanded *Webre Steib Company, Ltd.* (65 Sup. Ct. 578) on February 12, 1945; and the rules laid down for the guidance of the lower Court in that case are equally applicable to the instant case but the decision of the Court below is not in accord with such rules; insofar as

The Court below decided the cause on the basis of the margins—which in this case was adverse to the taxpayer—despite the rebuttal of such margins; and

The Court below failed to weigh the evidence contained in the findings of fact; and

The Court below failed to give any consideration to the 1936 crop experience; and

THAT the decision of the Court below is not sustainable in law as the law has been determined by this Court; and, as set forth in detail in the accompanying Brief;

WHEREFORE, it is prayed that this Petition for Rehearing be granted and a writ of certiorari issue.

C. J. BATTER,
902 American Security Building,
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*Counsel for Petitioner.*

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The foregoing Petition for Rehearing and the following Brief are presented for the consideration of this Court in good faith and in the firm belief of Counsel that equal justice under law requires a remand of the cause. This Petition is not filed for purposes of delay.

C. J. BATTER.

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## BRIEF IN SUPPORT OF PETITION FOR REHEARING.

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### INTRODUCTION.

The instant case, *Webre Steib Company, Ltd.* (Docket No. 148) and *Slack Bros., Inc.* (Docket No. 150) are companion cases. All three taxpayers are growers and processors of sugar cane, and all are seasonal operators. The cases were tried in the same manner before the Processing Tax Board, and the same Counsel appeared for both parties in each case. The Processing Tax Board decided *Webre Steib* and The Tax Court denied rehearing. The Tax Court decided the instant case and *Slack Bros., Inc.* from the record made before the Processing Tax Board. The findings of fact differ only slightly, the primary difference being that in the case of *Webre Steib* the margin was favorable to the petitioner, whereas in the instant

case and *Slack Bros., Inc.* the margin was unfavorable due to special circumstances set forth in the findings.

The Fifth Circuit Court of Appeals heard all three cases on the one day and decided all three cases on February 15, 1944. To the extent that the Courts below applied the law improperly in *Webre Steib,* sufficient to cause a remand by this Court, it would seem such Courts erred in like manner in the instant case and *Slack Bros., Inc.* It is not reasonable to suppose that the Courts below applied the law correctly in this case and *Slack Bros., Inc.* and applied it incorrectly in *Webre Steib Company, Ltd.*

In all three cases writs of certiorari were applied for on the same day; that is, June 12, 1944. This Court granted certiorari in *Webre Steib* on October 9, 1944 and failed to act on the instant case and *Slack Bros., Inc.* The impression created was that if the taxpayer were successful in *Webre Steib,* certiorari and remand would follow as a matter of course in this case and *Slack Bros., Inc.*

The taxpayer was successful in *Webre Steib* and three weeks later certiorari was denied in the case at bar and *Slack Bros., Inc.*

The case at bar does not lend itself to being distinguished from the holdings of this Court in *Webre Steib Company, Ltd.*—rather, comparison is in order. In this Brief, we, therefore, address ourselves to applying the holdings of the Court in *Webre Steib* to the case at bar, to the end and purpose of satisfying the Court that the granting of a writ and a remand are merited.

## THE WAY IN WHICH THE CASE HAS BEEN TRIED.

The *Webre Steib* case was a case of first impression to this Court. The meaning of the ambiguous and complex statute had not been determined. Numerous Courts and Counsel have labored in an effort to ascertain the rights of the parties. Results differed, and finally in *Webre Steib* this Court determined the law, remanded the case, and directed The Tax Court to take:

> "such further evidence as that court may think it proper to receive in view of the way in which the case has been tried." (65 Sup. Ct. 583)

The foregoing instruction followed an observation by the Court that:

> "The fact may be that neither side's evidence goes very far toward demonstrating where the burden of the tax fell" citing Johnson, AAA Refunds: A Study in Tax Incidence (1937) 37 Col. L. Rev. 910.

Johnson's article points out the economic features of tax shift, the effect of supply and demand, marginal operators, etc. All three cases, the case at bar, *Webre Steib* and *Slack* were tried on the same theory, but the Court below took no cognizance of this type of evidence. In the case of sugar, the published reports of the Department of Agriculture resolve the Johnson test in favor of the taxpayer (CF. Press Release, Secretary of Agriculture pp. 79-81 of Brief for Petitioner in Webre Steib Company, Ltd. Docket No. 148). Now, because of the remand such evidence will be weighed in *Webre Steib*, whereas, unless certiorari is granted and remand ordered in the case at bar, your petitioner will be denied an equal opportunity to avail of similar evidence.

We sincerely believe that on this ground alone, certiorari should be granted and the cause remanded.

## WEIGHING THE EVIDENCE.

In *Webre Steib* this Court ordered the cause remanded because the trial Court decided the case on the presumption which had been rebutted instead of weighing the evidence. We think this fact equally true in the case at bar. The Tax Court states: (R. 60)

> "During the tax period it was not economically impossible for the claimant to shift the tax burden to its customers, for it did this, as it admits, as to $2.737.12 by adding this tax to the price as a separate item. Logically it is reasonable to suppose that the claimant

> probably was also able to pass on the remaining tax to its other customers. At least we can reach no assured conclusion that it did not, or that the sales involving $2,737.12 were exceptional rather than typical. The claimant has failed to overcome the prima facie effect of the unfavorable comparisons of the margins and has failed to prove that it bore the burden of the tax and did not shift it by any means whatever to those to whom it sold its products."

The foregoing basis for the decision of The Tax Court is not sustainable in law. It disregards the evidence. It is contrary to the findings of fact made by The Tax Court. The evidence was sufficient to rebut the presumption but The Tax Court disregarded such evidence and decided the case on the presumption instead of weighing the evidence.

*Rebuttal of presumption:* The findings of fact made by The Tax Court clearly establish that the presumption was rebutted, but The Tax Court ignored such findings and held that the passing on of $2,737.12 of tax was indicative of the passing on of the entire tax.

The Tax Court in its opinion states with regard to the $2,737.12 of tax passed on: (R. 60)

> "At least we can reach no assured conclusion that it did not, or that the sales involving the $2,737.12 were exceptional rather than typical"

but in its finding of facts, The Tax Court states: (R. 58)

> "The processing tax was not billed as a separate item on claimant's invoices to customers covering its products sold, except on seven invoices, upon which the processing tax in the aggregate amount of $2,737.12 was billed as a separate charge on a total of 575,700 pounds of second raw sugar made from magma.

The Tax Court also found as a fact: (R. 58)

> "the units of commodity processed by the claimant during the tax period was 8,988,103 pounds, consisting of x x x x and 554,036 pounds, or 6.2 percent of magma: out of which second and third grade sugar was made."

The tax was passed on only on the magma, or second sugars, and it is self-evident that magma comprising 6.2 per cent of the commodity processed is exceptional and not typical. The whole premise of The Tax Court's decision falls when the evidence pertaining to the $2,737.12 is weighed.

The Tax Court further states: (R. 60)

> "Logically it is reasonable to suppose that the claimant probably was also able to pass on the remaining tax to its other customers."

If the evidence had been weighed there would be no basis for that statement because the major premise on which it rests is false. The $2,737.12 was exceptional (second sugars made from magma) and not typical.

What is the evidence that was not weighed and that rebuts the margin presumption? The findings of fact disclose:

That in 1933 the claimant was unable to meet its payrolls for four months; that its land was in poor condition; and that due to loss of confidence in the claimant's ability to pay, it was only able to buy 33,226 tons of sugar compared to 66,153 tons of sugar the year before (R. 55). Such conditions are bound to be reflected in increased costs for grown and purchased cane and decrease the margin for the base period—resulting in the unfavorable margin in the tax period;

In 1933 there was an oversupply of sugar (R. 55); prices were at low ebb; during a period when the claimant did no processing (R. 53) prices advanced from $2.80 to $3.65 (R. 56); as the claimant again entered the market, October 1933, the beetsugar crop which produced 300,000 tons more sugar than had been produced in any year before 1933 came upon the market (R. 56); prices declined from $3.65 to $2.80 (R. 56); and there was at least 50 percent more sugar available than could be consumed in a year (R. 56).

The sales price in 1934 was about the same as during the year before the tax (R. 73). This is important because the Respondent argues and the Court finds that the tax was passed on in the selling price—not back (R. 60).

We believe the rationale of this Court's opinion in *Webre Steib* requires a holding that the presumption is inoperative. In any event, it is clear from the holding of The Tax Court quoted above that its holding that the presumption was not rebutted rested on an erroneous conception of the billing of $2,737.12 of tax on second sugar instead of a weighing of the evidence as contained in its findings of fact.

## 1936 CROP EXPERIENCE.

In the *Webre Steib* case this Court held that: (65 Sup. Ct. 583-4)

> "The 1936 experience, though it could not help petitioner to create a favorable presumption, was entitled to be given whatever probative value it might independently have had and, subject to the usual principles of admissibility, was therefore admissible."

The Tax Court excluded the 1936 crop from consideration (R. 62). The 1936 crop experience, considering the fact that due to the continuation of the quota system the factors were the same during the tax period (R. 57), and further taking into account the finding of The Tax Court that the 1936 crop experience shows a complete absorption of the tax (R. 58), makes that evidence and the failure to weigh it sufficient to change the outcome, and a fortiori reason for granting the writ and remanding.

## ACTUAL EXTENT OF TAX BURDEN BORNE.

This Court in the *Webre Steib* remand instructed The Tax Court to take such further evidence as it may think proper in view of the way in which the case was tried. This instruction was based on the economic incidence of the tax citing *Johnson, AAA Refunds* (supra)

The claimant, in the case at bar, introduced in evidence reports of the Department of Agriculture that resolve that factor in favor of the taxpayer, concluding that the quota system eliminated the ordinary and usual economic effects. The opinion of The Tax Court (R. 61) brushes aside that evidence on the premise that the claimant did not sell to the ultimate consumer. The findings of fact show that all but one percent of the sugar was sold to wholesale grocery houses, chain stores, candy manufacturers, and bakeries (R. 54). The conclusion of the Court is not supported by the findings of fact. The evidence of the claimant, that is, the Department reports and the 1936 crop experience, were directed to show that the quota system was the price controlling factor.

The Tax Court in its opinion states: (R. 61)

> "The quota system remained in effect after the invalidation of the tax and the prospect of the application of a quota system had a stimulating effect on prices prior to the enactment of the sugar amendment, so that the increase may have been to some extent due to the tax."

This conclusion is erroneous in part, and not sustainable in law. The findings of fact disclose that on June 1, 1934, a week before the effective date of the tax, the price had declined to $4.10 from a high of $4.70 (R. 56). There is nothing stimulating about a decline of 60 cents—so that the premise for that conclusion is wrong. The ultimate conclusion that the price rise of June 8th "may have been to some extent due to the tax" is necessarily wrong. It was due to the quota as the 1936 crop experience shows.

However, assuming the premise of The Tax Court that the increase "may have been to some extent due to the tax", then is not the claimant—in the absence of other evidence indicating a tax shift—entitled to a refund of such part of the tax as was not included in that price rise? It was the duty of The Tax Court to measure the part not so shifted and order a refund to that extent.

The fact is that upon a weighing of all the evidence—that is, the Government's admissions through the publications of the Department of Agriculture (Cf pp. 79-81 Petitioner's Brief in Webre Steib); the 1936 crop experience, a period when quotas were in effect (R. 57, 58); the fact that the amount realized was not based on the sales price but on the action of the market following the sale (R. 54, 55); and, that sugar was sold on "so-called market move[s]", that is, claimants customers could satisfy their needs before an advance in price (R. 54)—the conclusion is inevitable that the tax was not shifted, and, any decision to the contrary is not sustainable in law.

## CONCLUSION.

WHEREFORE, it is prayed that this Court will rehear its denial of a writ of certiorari, grant the same, and order the cause remanded to The Tax Court on the authority of *Webre Steib Company, Ltd.*

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March, 1945.